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TOWARDS THE IMPROVEMENT OF CLARITY IN LEGAL WRITING

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Summary: *Legal English often poses problems for non-native English-speaking law students, lawyers, legal and business professionals.*

The purpose of this paper is to provide a practical reference which will help them improve their legal writing skills.

The paper commences with the insight into the development of legal English.

Furthermore, it gives the main reasons what makes legal language sometimes difficult to understand.

There is no doubt that if legal professionals want to communicate effectively with the members of the public, they must do so in a clear legal language.

An awareness of some of the typical features of this writing style can make it easier to understand and write texts of this kind.

Therefore, there are numerous suggestions on what to avoid in legal writing.

Naturally, not all, but the most important suggestions are listed.

Finally, it is important to emphasise that this paper is intended to encourage legal professionals to improve their ability to write clear and accurate legal texts and documents in English.

Key words: *avoid, legal English, legal professionals, legal writing*

1. Introduction

Legal English has become a global phenomenon as it is the predominant language of international business and a legal language within the European Union.

Lawyers and legal professionals whose mother tongue is not English find it difficult to understand legal language because it is often very different from the “general” English.

In realizing the importance of legal writing, one should also recognize that what makes good legal writing is good legal reading. Writing is an act of communication and it should be appropriate to its audience and purpose. The goal of legal writing is to be clear and concise. To achieve easier accessibility to legal documents, the use of a plain language is a prerequisite.

The aim of this paper is to help those whose legal writing skills may be deficient by giving them some guidelines in what to avoid in legal writing.

2. Sources of Legal English

Modern legal English is based on the standard English. However, it owes a particular debt to Latin and French. Following the Norman invasion of

England in 1066, French became the official language of England. Over the period of 300 years, French was the language of legal proceedings. Many words which are still in current legal use have their roots from that period (*property, estate, lease* and *tenant*). During the period, Latin remained the language of formal records and statutes. Its influence can still be seen in legal writing in a number of words and phrases like *de facto, bona fide* and *inter alia*.

Therefore, following the Norman invasion three languages were used in England. Naturally, English was the spoken language of the majority of the population. It was not used in legal matters, but all writing was done in Latin or French. In 1356, the Statute of Pleading was enacted (in French), stating that all legal proceedings should be in English, but recorded in Latin. Throughout the 17th century continued the use of French in legal pleadings, although some new branches of law began to develop entirely in English (e.g. commercial law). English was adopted for different kinds of legal documents at different times. For example wills began to be written in English in about 1400 and statutes from 1489. (Legal English, 2009, < <http://en.wikipedia.org/wiki/Legal-English> >).

3. What makes legal language difficult?

Undoubtedly one of the things that make legal language difficult to understand is the fact that it is different from everyday English.

First of all, the writing conventions are different. Sentences have unusual structures, foreign phrases are frequently used instead of English phrases (eg, *inter alia* instead of *amongst others*), punctuation is used insufficiently, peculiar and confusing set phrases are found (*null and void, all and sundry*), strange pronouns are used (*the same, the aforesaid*).

Although words are lawyer's most essential tools, a large number of them are very difficult. They fall into four categories.

1. Legal jargon comprises words used by lawyers which are difficult for non-lawyers to understand. They range from near-slang to almost technically precise words. Examples are *boilerplate clause* and *corporate veil*. Jargon also includes some archaic words no longer used in ordinary English like *annul* and *bequest*.

It also includes some words with highly specialised meanings found in legal documents like *emoluments* and *provenance*.

2. Legal terms of art are words and phrases which have meanings that are strictly defined by law and cannot usually be replaced by other words (eg, *promissory estoppel*, *abatement*)

3. Next is a small group of words which have one meaning as legal terms of art and another one in general English. One example is the word *tender*, which as a legal term of art refers to an offer to supply goods or services. Normally a tender must be accepted to create a contract. In everyday English it means gentle and kind, young and vulnerable, easily damaged, (of food) easy to cut or chew, (of a part of the body) painful to the touch.

4. Finally, there is a group of words and phrases which are used in general English as well as in legal English but in unusual contexts (eg, *convene*, *prefer*, *null*). *Null* as a legal term means invalid, having no legal force. For example, "the contract was declared null (and void)." In general English it means having the value zero, for example, "a null result."

4. Good legal writing

When legal professionals tend to communicate effectively with the public, either in writing or speech, they must do so in the language that the public understands." If I had more time, I would have written less", is a famous sentence Mark Twain used when discussing the art of writing. This sentence can easily be applied to good legal writers whose goal should be to realize the importance of clear and concise legal writing. Good legal writing is good legal reading. Naturally writing should be appropriate to its audience and purpose. It follows the rules of grammar and syntax in communicating legal rules, legal concepts or legal arguments. Sentences are complete, with subject-predicate agreement and modifiers properly placed.

Precision is vital in legal writing. The law does not tolerate ambiguity. Good legal writing should be organized at multiple levels with a beginning, middle and an end. The choice of a good topic sentences helps to realize what paragraphs are about. Finally the conclusion should be drawn carefully, avoiding speculation and sensationalism.

5. What to avoid in legal writing

Clarity, consistency and effectiveness are the three goals all legal writing should aim at. In order to achieve these goals there are many suggestions what to avoid in legal writing. The following is the list of ten suggestions that might help legal professionals in their attempt to improve their writing skills.

5.1 Omit needless words and phrases

Short sentences, plain words and one main idea per sentence help to make writing easy to understand. If it is possible to cut words out without affecting the meaning of the sentence, it should be done. Phrases which introduce new pieces of information can often be reduced to single words. (A Plain English Handbook, 1998, < <http://www.sec.gov/pdf/handbook.pdf> >)

Here are some examples:

Commonly used phrase	Single word equivalent
be a significant factor in	affect, influence
be inclined to the view that	think(that)
due to the fact that	because
give rise to	cause
have a detrimental effect upon	harm
have an effect upon	affect
having regard to	concerning
impact upon	affect
in order to	to
in spite of the fact that	despite, although
in view of	because
it is arguable that	perhaps
notwithstanding the fact that	despite, although
was in violation of	violated
with regard to the question of	concerning, regarding

5.2 Sexist language

5.2.1 The pronoun problem

English evolved in male-dominated cultures, so this is reflected in the language. *Anyone*, *everyone* and *no one* are gender-neutral pronouns and *person* is a gender-neutral word. However, English does not have gender-neutral singular personal pronouns. It has *he*, *she* and *it*. Personal pronouns *he* or *his* are inappropriate in a document referring to a person whose sex might be male or female. To avoid the use of *he* or *his*, the following methods can be practiced:

- changing the pronoun to an article such as *a* or *the*. For example, 'the solicitor advised the client on his case' can be changed to 'the solicitor advised the client on the case';
- deleting the pronoun reference if possible. For example, 'the lawyer read the documents as soon as they were delivered to him': delete *to him*.
- using the relative pronoun *who*, when *he* follows *if*, for example, 'if he does not prepare the case'... should be 'a lawyer who does not prepare the case ...'
- Pluralize, so that *he* becomes *they*. For example, 'Student should avoid engaging in any activities that might bring discredit to his school.' can be changed to 'Students should avoid engaging in any activities that might bring discredit to their school.' (Chew & Kelley-Chew, 2007, < <http://www.highbeam.com/Docprint.aspx?DocId=1G1:172777359> >)

5.2.2 Terminology

It is important to use terminology which is not gender-specific. Particular attention should be paid to words ending in *-man*.

Here are some examples of old-fashioned terms and suggested non-sexist alternatives. (Chew & Kelley Chew, 2007,

< <http://www.highbeam.com/Docprint.aspx?DocId=1G1:172777359> >)

Old-fashioned term

businessman
chairman
draftsman
foreman (of a jury)
juryman
layman

Non-sexist equivalent

business person
chair/chairperson
drafter
presiding juror
juror
layperson

mankind	humankind/humanity
manpower	workforce/personnel
ombudsman	ombuds
policeman /policewoman	police officer
reasonable man	reasonable person
spokesman	representative/spokesperson
statesman	political leader

5.3 Unnecessary Latin

Latin words and expressions are frequently found in legal texts of every kind, from statutes to e-mails. Latin makes legal writing sound more complicated than it is, and if there is an everyday English equivalent, it should be used.

Here is the list of frequently used Latin words and expressions and their English equivalents. (Krois-Lindner, 2006)

Latin words and expressions	English equivalent
ab initio	from the beginning
ad hoc	for this purpose
arguendo	for the sake of argument
de facto	in fact
de minimis	minimal
et alii (et al.)	and others
exempli gratia (e.g.)	for example
id est (i.e.)	that is
inter alia	among others
ipso facto	by that very fact itself
per annum	per year
per se	by itself
pro forma	as a matter of form
pro rata	proportionally
sic	thus
sua sponte	on its own
sub iudice	before the court
sui juris	of one's own right
vel non	or not
versus	against

5.4 Multiple negatives

One negative in a sentence is not normally a problem, but multiple negatives usually require the reader to do a double-take.

Here is a sentence from the defendant's reply brief in support of a motion for a bill of particulars in *United States v. Dimson* (the case alleging that a Coca-Cola employee and two others tried to sell trade secrets to PepsiCo): "Mr Dimson in no way concedes the point that impossibility is not a defense to these charges." The clearer and four words shorter sentence is: "Mr Dimson maintains that impossibility is a defense to these charges." (Don't be so Negative, 2007,

< http://www.legalwritingworks.com/what_works.html >)

5.5 Nominalisations

Nominalisation is where noun phrases are used instead of verbs. Legal writing contains nouns that could have been verbs. They usually end with one of the following suffixes: *-tion, -sion, -ment, -ance, -ity*. By using verbs instead of nouns, legal texts become shorter and more dynamic and the focus is on actions instead of on things or on status.

Some examples of nominalisations found in legal writing and their active verb equivalents are: (Wydict, 2005)

Nominalisation

arbitration
arrangement
compulsion
enablement
enforcement
identity
implementation
incorporation
litigation
negotiation
obligation
ownership
perpetration
possession
reduction
violation

Active verb equivalent

arbitrate
arrange
compel
enable
enforce
identify
implement
incorporate
litigate
negotiate
obligate, oblige
own
perpetrate
possess
reduce
violate

5.6 Constantly litigated words

Two words and phrases frequently used in legal drafting have produced constant litigation: *best endeavours* and *forthwith*. When used in contracts *best endeavours* indicates that parties have promised to attempt to do something. This usually suggests a compromise between the parties who are not prepared to accept a clear statement of their obligation.

Forthwith, on the other hand, causes problems because it is too open-ended to present certainty for the contract. *Forthwith*, depending on the context, could mean a matter of hours or a matter of weeks.

In order to avoid ambiguity, it is better to specify if possible a precise time and date by which something must be done if it is essential in an agreement. (Garner, 2001)

5.7 Doublets and triplets

Legal writers frequently use two or three words to say what one word could. In the period of the English Renaissance, this was a common figure of speech called synonymia. Thus, we have in legal language *acknowledge and confess*, *act and deed* and *goods and chattels*. To avoid needless repetition apply the following rule: If two words are simply synonyms, choose the one that fits the context best.

Following are two lists containing some of common doublets and triplets in legal writing. (Garner, 2001)

Doublets

able and willing	fit and proper
any and all	legal and valid
authorize and empower	make and execute
by and with	new and novel
cease and determine	null and void
do and perform	over and above
each and all	unless and until
false and untrue	will and testament

Triplets and longer strings

cancel, annul, and set aside	ready, willing, and able
hold, possess, and enjoy	signed, sealed, and delivered

make, publish, and declare
pay, satisfy, and discharge

vague, non-specific and indefinite

5.8 Jargon

Professor Joseph Kimble (2006), a noted scholar on legal writing, warns that we should avoid those words and formalisms that give legal writing its musty smell. He includes in his list of examples the following words:

above-mentioned	thereafter
aforementioned	thereof
foregoing	therewith
henceforth	whatsoever
hereafter	whereat
hereby	wherein
herewith	whereof

5.9 Delete every *shall*

Communication requires using ordinary modal verbs where appropriate. *Shall* is one of officious and obsolete words that has been used in legal writing for many years. Besides being outdated, *shall* is imprecise. It can indicate either a prediction or an obligation. By dropping *shall* any document becomes more reader-friendly. Instead of *shall* verb *must* is more frequently used to convey obligations, create requirements and prohibitions.

Richard Wydick (2005), a famous legal writing scholar, recommends the following substitutions:

To express	Use
is required to	must
is required not to/is not allowed	must not
has discretion to/is permitted to	may
is not permitted to	may not
ought to	should
future contingency	will

5.10 Minimize *is, are, was and were*

Many legal writers use the verb *to be* as the focal point of many sentences. By doing so, they use up the most important part of the English sentence, the verb and say very little. Strong, precise verbs should be used instead.

Thus, instead of saying: "The court was firm in its decision", use: "The court remained adamant and declined to change its decision."

Intransitive action verbs show motion or location of a person or a thing. Instead of saying: "The Miranda case is the best example of this approach", use "The Miranda case stands as the best example of this approach."

6. Conclusion

The primary aim of this paper is helping to improve legal writing skills of law students, young lawyers at the beginning of their legal career, legal professionals and interested laypeople.

If legal language is to become clear and more efficient means of communication, there are numerous suggestions on what to avoid in legal writing.

Given these suggestions legal professionals will find it easier to both understand English legal language and to use it clearly and accurately in everyday legal context.

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K JASNOM I RAZUMLJIVOM PRAVNOM JEZIKU

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Veleučilište u Požegi

Sažetak: *Hrvatska je, nakon sklapanja sporazuma o stabilizaciji i pridruživanju, stekla status kandidata za punopravno članstvo u Europskoj Uniji. Stoga je usklađivanje nacionalnog prava s europskim, poznavanje jezika struke i vještina interkulturalne komunikacije imperativ svim profilima pravnih stručnjaka. No, engleski jezik pravne struke često je problem neizvornim govornicima.*

Kako je pravni jezik težak za razumijevanje zbog stručnog nazivlja, terminologiziranih sintagmi i pravnog žargona, za dostupnost i razumljivost ne samo pravnoj struci već i onima koji se moraju njime služiti, preporučena je uporaba jednostavnoga pravnog jezika. U uvodnom dijelu rada opisan je povijesni razvoj engleskog jezika pravne struke, a zatim su dani neki praktični savjeti za razumijevanje vještine pisanja i uporabe pravne terminologije te je predloženo što izbjegavati pri pisanju pravnog teksta.

Neupitna je važnost pravnog jezika, stoga smo ovim radom pokušali doprinijeti njegovom boljem korištenju i lakšem razumijevanju.

Ključne riječi: *engleski jezik pravne struke, izbjegavati, izostaviti, pravni stručnjaci*
